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IN THE

Supreme Court of the United States

October Term, 1958

No. 887

WEBSTER ROSEWOOD CORPORATION,
Petitioner

vs.

SCHINE CHAIN THEATRES, INC.,
SCHINE THEATRICAL COMPANY,
SCHINE CIRCUIT, INC.,
SCHINE LEXINGTON CORPORATION,
J. MEYER SCHINE,
LOUIS W. SCHINE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari:	
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement	4
Argument	9
Conclusion	10
Appendix A:	
Opinion of District Court (157 F. Supp. 251)	11
Opinion of U. S. Court of Appeals (263 F. 2d 533)	27

TABLE OF CASES

J. J. Theatres v. Twentieth Century Fox Film Corp. (2 Cir.), 212 F. 2d 840	10
Milwaukee Towne Corp. v. Loew's, Inc. (7 Cir.), 190 F. 2d 561	10
Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 542 et seq.	9
United States v. Paramount Pictures, Inc., 334 U.S. 131	9
United States v. Schine Chain Theatres, 63 F. Supp. 229, aff'd 334 U.S. 110	5, 6, 7, 8, 9, 10
United States v. Schine, 260 F. 2d 552, cert. den. 358 U.S.	10

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Schine Chain Theatres, Inc., Schine Theatrical Company, Schine Circuit, Inc., Schine Lexington Corporation, J. Meyer Schine, Louis W. Schine and John A. May,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Webster Rosewood Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 13, 1959.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix A hereto (*infra*, p. 11) is reported in 157 F. Supp. 251. The opinion of the Court of Appeals, printed in Appendix A hereto (*infra*, p. 27) is reported in 263 F. 2d 533.

JURISDICTION

The judgment of the Court of Appeals was entered February 13, 1959 (p. 31, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

1. When in a civil antitrust suit brought by the United States against a motion picture exhibitor the district court, in 1946, after a trial on the merits, enters a decree adjudging the defendant guilty of unlawful monopolization as of the date when the case was first called for trial, i.e., May 19, 1942, and when the defendant appeals to the Supreme Court, and obtains a stay of proceedings, and when the Supreme Court, on May 3, 1948, affirms the judgment; and when in a private antitrust suit subsequently commenced against the same defendant, alleging the same unlawful monopolization, the plaintiff claims damages for injuries suffered from June 20, 1942, to May 10, 1950, and offers in evidence the decree entered in the Government suit, does the trial court err in rejecting the offer on the ground that the decree has no evidential force or effect subsequent to May 19, 1942?

2. In an antitrust action commenced by a motion picture exhibitor against another exhibitor, on the ground that the latter had so unlawfully monopolized the supply of pictures that the plaintiff could not obtain any for use in his theatre, is it necessary that plaintiff prove that he made demands on distributors for a supply of pictures before commencing the action?

STATUTE INVOLVED

The statute involved is Section 5 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §16, which reads in material part:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ."

STATEMENT

This is an action for damages and injunction under the federal antitrust laws. The trial was to the court without a jury. The court made no formal findings, but delivered an opinion (p. 11, *infra*) holding, in effect, that plaintiff's (petitioner's) evidence was insufficient to support an inference of conspiracy or intent to monopolize. Accordingly the court entered a judgment dismissing the complaint, and the Court of Appeals for the Second Circuit affirmed (p. 31, *infra*).

In this proceeding, petitioner attacks two of the trial court's rulings, viz: (1) the ruling, in effect, rejecting peti-

tioner's offer in evidence of the judgment entered in the *Schine* case (*United States v. Schine Chain Theatres*, 63 F. Supp. 229, affirmed 334 U.S. 110); and (2) the ruling that it was obligatory on petitioner (an exhibitor of motion pictures) to prove that it had made demands on distributors for supplies of pictures before suing the respondent, who is not a distributor, but another exhibitor.

Petitioner is the operator of a subsequent-run (neighborhood) theatre in Rochester, New York, named the Webster. Respondents are the operators of a chain of theatres numbering about 148,[1] including a number of subsequent-run theatres in Rochester.

Petitioner, or a predecessor corporation,[2] has operated the Webster Theatre since its construction in 1927. From 1927 to about 1932 respondents had a one-half interest in the revenue produced by the theatre, and during that period the theatre was operated on a "first neighborhood run" policy,[3] sharing the pictures of the major distributors with the State Theatre,[4] which was owned and operated by respondents.

In 1933 (evidently as a result of the financial depression of that era) respondents dropped their interest in the Webster Theatre and petitioner operated it alone until the Fall of 1940, when respondents purchased it (p. 15, *infra*).

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[1] *Schine Chain Theatres v. United States*, 334 U.S. 110, 113.

[2] From time to time the theatre has been operated by differently named corporations, but at all times the principal shareholder and general manager has been one Max Fogel (*infra*, pp. 12-15).

[3] Stenographic Transcript 49-51.

[4] The State and Webster theatres were built at about the same time and are only six blocks, or ¼ of a mile, apart. (*United States v. Schine Chain Theatres*, 63 F. Supp. 229, 237).

In the meantime, to wit, in 1939, the United States commenced its action against respondents: the *Schine* case, supra (*United States v. Schine Chain Theatres*, 63 F. Supp. 229, affirmed 334 U.S. 110), and that case was called for trial on May 19, 1942. At that time, however, the Government agreed to postpone the date of the trial until May 19, 1944, in return for which the respondents agreed to the entry of an order requiring them, *inter alia*, to return at the purchase price all of the theatres which they had bought since the commencement of the suit. As a result of that order, petitioner regained ownership and possession of the Webster Theatre on June 20, 1942.

Petitioner operated the Webster Theatre, in competition with respondent, from June 20, 1942 until the commencement of the instant action, on May 10, 1950, and thereafter.

During the entire period covered by this case (June 20, 1942 to May 10, 1950) every picture which petitioner obtained for exhibition at the Webster Theatre had been previously exhibited at respondents' State Theatre (p. 21, *infra*) which, as aforesaid, was located only six blocks away (Note 4, *supra*).

The trial of the Government's *Schine* case began on May 31, 1944, and was concluded November 10, 1944. The trial court found as a fact, among others, that respondents had monopolized ". . . the first neighborhood run in Rochester". (p. 16, *infra*), and a decree was entered enjoining respondents from further violation of the law. An appeal to this Court was allowed, and, on July 5, 1946, the District Court entered an order staying its judgment pending the appeal.

On May 3, 1948, this Court delivered an opinion affirming the judgment insofar as the findings on liability are concerned: *Schine Chain Theatres v. United States*, 334 U.S. 110.

Among the findings of the District Court which this Court affirmed were the following (pp. 14, 18, *infra*, and see *United States v. Schine Chain Theatres*, 63 F. Supp. 229, 237):

"11. Defendants' authorized agents made statements to independents which are reasonably construed as threats:

. . . . . .

(h) At Rochester, J. Meyer Schine told independents, who were then building the Webster, that it was too near the State (Schine's) and not justified, and Schine said he would build a theatre near the Murray (owned by independents). The State and the Webster theatres were ¾ mile apart. Schine later took over the Webster. Schine testified he said that it would not be sensible to build the Webster, but denied that he said he would build near the Murray."

"13. 'Schine' was able to monopolize first-run product at Corbin, Medina and Lockport even though the physical facilities of the independents in those towns were better than Schine's. He was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better."

At the trial of the instant case the plaintiff (petitioner) offer the *Schine* case judgment in evidence, but the t[illegible] Judge rule[d] that it was admissible only with respect to [illegible]

period of time prior to May 19, 1942 (p. 19, *infra*). Since, as aforesaid, the claimed damage period in the instant case did not commence until June 20, 1942, the court's ruling had the same effect as complete rejection of the proferred evidence would have had. The ruling was based on a finding in the *Schine* case reading as follows (p. 19, *infra*):

> "All findings made herein with respect to any acts committed by the defendants or any of them, or any course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date."

The District Court also held that petitioner's case was insufficient because of absence of proof of demanding pictures of the distributors (p. 25, *infra*).

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court: (p. 27, *et seq.*, *infra*).

ARGUMENT

1.

The rulings below drastically, and illogically, restrict the effectiveness of section 5 of the Clayton Act. Customarily, district court decrees enjoining violations of the Sherman Act do not become effective until long after the date of the trial. In the first place, the trials are usually complicated, which results in substantial delay in delivery of the adjudication, and, in the second place, the defendants frequently appeal to this Court, which consumes much additional time. For instance, in the *Schine* case, the trial took place in 1944, the district court decree was entered in 1946, and the opinion of this Court was delivered on May 3, 1948; and almost exactly the same dates were involved in the Government's *Paramount* case (*United States v. Paramount Pictures, Inc.*, 334 U.S. 131). Indeed, the opinions of this Court in the *Schine* and *Paramount* cases were delivered on the same day (May 3, 1948).

The question of the effective date of the decrees involved in the *Paramount* case was considered by this Court in *Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.*, 346 U.S. 537, and in that case this Court indicated, in effect, that the decrees should be held admissible with respect to the full period of time involved in the litigation, including the time consumed by the appeal to this Court (346 U.S. at page 542, *et seq.*).

The court below based its holding on the *Theatre Enterprises* case, but for the reason above stated petitioner submits that the court misconstrued that case.

Argument

In the instant case petitioner abundantly proved that the respondents continued to operate their monopoly throughout the entire claimed damage period, and in this connection it may be noted that in 1956 the District Court held the individual respondents to be in criminal contempt for violations of the *Schine* case injunction, and this holding was affirmed by the Court of Appeals: *United States v. Schine*, 260 F. 2d 552, cert. den. 358 U.S.

2.

The lower court's holding on the matter of demand also illogically restricts effective enforcement of the antitrust laws. The court held that "[s]uch a demand was a necessary condition of any claim for relief." (p. 31, *infra*). The court relied on *J. J. Theatres v. Twentieth Century Fox Film Corp.* (2 Cir.), 212 F. 2d 840, and *Milwaukee Towne Corp. v. Loew's, Inc.* (7 Cir.), 190 F. 2d 561, but both of these cases involved film distributors as defendants. There is no authority or reason for requiring an exhibitor to show that he made demands for pictures before suing another exhibitor, as was done in the instant case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS THOMAS ANDERSON,
Counsel for Petitioner.

April 30, 1959.

APPENDIX A

Decision and Order of the United States District Court, Northern District of New York

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MEMORANDUM-DECISION AND ORDER

(157 F. Supp. 251)

Hon. James T. Foley, D. J.

This action is one under the antitrust laws involving the usual provisions of the Sherman and Clayton Acts (15 U.S.C.A., 1, 2, 15, 16). It involves the motion picture business and by the complaint brings back on the screen the Schine interests, named as defendants, and the eight major distributors named as co-conspirators. Apparently, this type action will rise eternal against these same defense and conspirator players who featured in the court struggles of the 1940's in relation to conspiracy and monopoly government charges in the distribution and exhibition of motion pictures. Of course, the Schine decision is the important one in this controversy. (Schine Chain Theatres, Inc. et al. v. U. S., 334 U.S. 110 (1948), 63 F. Supp. 229 (W.D.N.Y. 1945); U. S. v. Paramount Pictures, Inc. et al., 334 U.S. 131, 85 F. Supp. 881.) The voluminous complaint generally is patterned after the writings in these decisions, but there is not too great resemblance between the complaint and the evidence produced at the trial in behalf of the plaintiff. Although this variance is not at all fatal under our

liberal procedures, these catch-all allegations taken from law books without too much regard for the actual circumstances and filed in 1950 in this district court, did not stand too well against actual trial combat in 1957, and the wide range of issues indicated by the complaint narrowed very much. In fairness it should be noted that the draftsmen of the complaint were not the same lawyers who undertook the preparation for trial and tried the case before me for the plaintiff. Complexity is inherent in these cases because of the broad sweep of the antitrust statutes in their terms and established interpretations. The conspiracy element is usually a nebulous thing to tie down because the evidence always tends to range far and wide; at times, in my judgment, with an inclination to outer space unless restricted. However, this situation should be simple in contrast because the plaintiff, except for the impact it urges of the findings and decrees in the Schine decisions on the questions of conspiracy and monopoly, limits the dispute we have to the deprivation of a first neighborhood run by reason of such conspiracy and monopoly and wants the comparative theatres limited to two alone, the Webster of the plaintiff and the State of the defendants, both located in the northeastern part of the City of Rochester, New York, three quarters of a mile or six blocks apart. Despite this simplicity of approach taken by the plaintiff, the evidence in its behalf followed again the roving design, and we were taken back to 1927 in an attempt to establish a perpetuity of business villainy on the part of Schine into the damage period claimed here from 1942 to 1950. The chief witness for the plaintiff corporation at the trial, and in fact the leading actor throughout the many years, because of his relationship with the erection and operation of the Webster Theatre, and now

the real principal in this lawsuit, because all the stock of the plaintiff is now owned by him and his wife, was Max Fogel. The import of his testimony, particularly when examined by his own lawyers, was to paint an agonizing picture of a victim crushed in the beginning and never allowed to rise again with his neighborhood theatre, the Webster, throughout the many years, except at the whim of the Schine interests and always bludgeoned by their monopoly and buying power, discussed by the United States Supreme Court in 334 U.S. 110, 115, 118. This portrayal, and it was quite interesting, provoked a robust, slam-bang defense at the trial and resulted in lengthy defense briefing and much of the simplicity from the plaintiff's viewpoint began to vanish.

A general review of the history of the Webster Theatre, the relations of Schine and Fogel with it in its topsy-turvy existence through the years amidst numerous corporate name changes seems important to this decision.* Max Fogel, who had experience in the theatre business from 1921, built the Webster Theatre in 1927 with other investors about six blocks away from the State Theatre, which had been newly built by Schine approximately a year before in 1926. There is little difference in the construction of the State and Webster, but important difference in location. There is an episode at this time of the construction of the Webster Theatre which varies through the years in its description and changes with the retelling, depending on the person who recalls it. It concerns a

* R shall denote the references to the transcript of this trial. Plaintiff's exhibits are numbered and defendants' lettered. Transcript of Record is reference to the record in U. S. v. Schine, W. D.N.Y., 63 F. Supp. 229.

threat by J. Myer Schine at this time to the persons building the Webster that the location of the Webster was too near the State and he would build a theatre near another theatre, the Murray, owned by them in Rochester, if they persisted. This episode was made a specific finding by Judge Knight. (Finding of Fact 11(h) of the Amended Findings of the District Court, W.D.N.Y., dated March 29, 1946; U. S. v. Schine Chain Theatres, Inc. et al., supra.) The finding is not a very determinative one because it merely states both versions as to the presence or absence of threat and seems to be one of the ambiguous findings allowed to stand by the Supreme Court because of the record as a whole and the support received from other findings to conclude unlawful purpose. (Schine Chain Theatres, Inc. et al. v. U. S., 334 U.S. 110, page 119.) This episode became further enmeshed and confused in the affidavit given by Fogel to the government in 1939 (Exhibit 5) and the recanting affidavit given to Schine in 1940 (Exhibit 4), both in evidence at this trial, concerning which Fogel freely admits now and marks in red on Exhibit 4, much he says was false. On the trial in 1957 Fogel elaborated further on this episode in 1927 testifying that J. Myer Schine said, in effect: "You have no right to build the Webster", and that Schine would not only build the other theatre but said he would see that Fogel and his associates would not get pictures for either of their theatres, and that Schine concluded it all by demanding 50% interest in the Webster (R. 36-40). Whether Fogel and his associates succumbed to the blackjack as he wants believed or whether he followed the old and practical adage: "If you can't beat them, join them", and thought a little monopoly his way would not be too bad, the arrangement was made and Schine took over a 50%

interest in the new operating company of the Webster Theatre which continued from 1927 until 1933. In 1933 the Schine interest, as Fogel puts it, "just dropped his part of the theatre, dropped out" (R. 42). Then, to hasten the review of this background, Fogel stayed with the Webster Theatre through varied operating companies, always as manager, with a substantial interest in ownership until 1940. In the Fall of 1940, Schine picked up the mortgage on the Webster and another theatre and came into full control and operation of the Webster until the Spring of 1942. During this period Fogel became an employee of Schine, managing a Rochester theatre of Schine and booking pictures for Schine for theatres in the Rochester area. The picture painted by Fogel is again that this was done under the crushing heel of the Schine monopoly, and he became the poorly paid employee who lost his theatre as a result of continued greed. Such pathos is not too well supported and is seriously contradicted by important evidence in the record of this trial. In any event, in 1942 by reason of a consent order entered in the District Court for the Western District of New York (Exhibit 7), Fogel with others reacquired the Webster from Schine and conducted it with varying degrees of ownership, finally to full ownership by him and his wife at a time during the period of claimed damage, June 20, 1942 to May 10, 1950. Many elements in this sketchy background are not important at all in the disposition of this suit because the narrow question at hand is knowing conspiracy and monopoly between Schine and its alleged coconspirators in the distribution of motion pictures to deprive the Webster Theatre from first neighborhood run during the years 1942 to 1950 to the financial detriment of the Webster Theatre. There are many specifics in the

evidence which apply directly to this limited question and allow reasonable conclusions, and I am old-fashioned enough to attempt to decide the problem on the record made before me, keeping the all-encompassing conspiracy principle within the bounds of the proof submitted.

The most turbulent issue in the lawsuit is the offer in evidence, upon which I reserved decision, of the consent decree dated June 24, 1949, signed by Judge Knight and consented to as a judgment by the government representatives and the Schine representatives (Exhibit 12 for Id.). I am sure that few exhibits in the history of litigation have drawn so much discussion and briefing as to its admissibility. The defense is one of depth with much substance at the various barricades as to competence and relevance. Of course, this decree was consented to at a time when a stillness in the Western District of New York existed in the Schine litigation and to give it effect and sense under Section 5 of the Clayton Act (15 U.S.C.A. 16) it must be related back to the judicial dispositions in the original government litigation against Schine.

In the amended findings in the government case dated March 29, 1946, Judge Knight found as part of Finding 13: "He (Schine) was able to monopolize the first neighborhood run in Rochester even though the physical facilities of the independents were better." (Vol. 4, page 3219 Transcript of Record). Upon review in 1947, the Supreme Court affirmed the judgment of the District Court in part and reversed it in part and remanded the cause to it for further proceedings in conformity with its opinion. (Schine v. U. S., supra, page 130.) From my reading of this Supreme Court opinion at page 117, this finding seems to be allowed to stand as one supported by substantial evidence.

and therefore, in my judgment, was not left open for determination upon remand and should be accepted as judicially settled. (See Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, page 543, footnote 11.) The finding, in my judgment, dovetails into the situation here and to reject it as the defense argues because the evidence in the case and the finding itself does not blue print the Webster Theatre would unreasonably minimize the "large advantage" to be rendered the private litigant of the prima facie effect of the criminal judgment under Section 5 of the Clayton Act. (Emich Motors Corporation v. General Motors Corporation, 340 U.S. 558, 568.) Even though the Emich authority limits such estoppel under Section 5 to questions "distinctly put in issue and directly determined in the criminal prosecution", if the mold of this general finding does not cover our situation because not exact enough, we surely would have, I believe, the "niggardly construction" cautioned against by Chief Judge Clark, dissenting in Eagle Lion Studios, Inc. et al. v. Loew's, Inc. et al., 2 Cir., decided September 9, 1957. It seems impossible in the massive cases brought by the government to curb monopoly to itemize every business entity that did suffer from such unlawful monopoly. If such particularization were necessary for the provisions of Section 5 to operate, then the benefits intended by that Section would be definitely curtailed by such reasoning. However, the better reasoning seems clear that such decrees are allowed as prima facie evidence of a general conspiracy with the necessary relation shown to the local area and the particular business interest alleged to be harmed by the impact of the broad, unlawful monopoly. (Emich v. General Motors, supra; DeLuxe Theatre Corp. v. Balaban & Katz Corp. et al., 95 F. Supp. 983, 986.) At least it is

clear that in the government case against Schine the "question" of first neighborhood run in Rochester was put in issue and directly determined at least in a general sense by Finding No. 13 of the amended findings by Judge Knight in 1946. Under my reasoning, this consent decree offered seems to be confortably within the concept of estoppel set forth in Section 5 and should not be disqualified from reception in evidence for that reason.

Next, the defense contends that under the terms of Section 5 the decree should not be received because it is entitled "Consent Decree as to Schine Defendants". The statute does except from its operation such form of consent, judgments or decrees "entered before any testimony has been taken". No matter how we blink our eyes or concede the attempt of clever draftsmanship to wipe out the past and let bygones be bygones, surely lengthy testimony remains in existence, and upon such testimony, findings and conclusions were made by the District Court which at least in part received the sanction, and there must be some finality about it, of the highest court in the land. This consent decree recited the previous judgments of the District Court, and in the introductory recital the District Court did not disown the previous parts of its original decree affirmed by the Supreme Court, and it would seem impossible for it to do so. This recital is to the effect only that no testimony was taken upon the issues to be determined upon remand and the consent of the defendants was "without admission by the defendants in respect to any such issue to be determined upon remand". To bar the decree because of its form would allow judicial realities to be circumvented by adroit wording after the issue has been drawn and quartered in the courts. On this contention of

defense to the admission of the exhibit I am inclined to the reasoning set forth in DeLuxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983, 986; Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458, 468; Homewood Theatres, Inc. v. Loew's, Inc., 110 F. Supp. 398, 409; and the suggestion in footnote 11, page 543 of Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537.

However, despite this inclination to receive the decree in evidence, there is serious question involved as to its relevancy because of the time period of the claim. The plaintiff, as it must, limits the period from June 20, 1942 to May 10, 1950, and settles down the money damages requested to an estimate of $132,855.52, to be trebled, lessened by a $28,000 settlement made by the distributors in 1948, making final computation of requested damages in the amount of $370,566.56. The difficulty is present because nothing in the English language could be plainer than that the District Court in the government case against Schine expressly confined its findings to activities prior to May 19, 1942. It was stated thus in the amended findings of the late Judge Knight, March 29, 1946:

> 30. "All findings made herein with respect to any acts committed by the defendants or any of them, or any course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date."

Surely, this must mean what it says, and makes untenable the plaintiff's contention that the consent decree

signed in 1949 stretches the prima facie principle of evidence through the years from 1942. The finding is absolute that such is not to be done. I shall overrule the varied objections of the defendants and admit the decree only as prima facie evidence of the conspiracy covering the Rochester area in relation to first neighborhood runs and existing only during the period involved as specifically set forth in the finding until May 19, 1942. (Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra, at page 541.)

I have labored much on this subject, probably too much, but it is caused by the stress placed upon this issue, particularly by the defense, and the fact that the proposition is such a debatable one in the courts. Also because without it the case of the plaintiff would be hanging in mid-air with little foundation, if any. I am frank to say that if I am in error as to the ground to be covered by the decree as to the time element, I still would be unable if I stretched the prima facie impact and conspiracy background of the decree to 1950 to infer conspiracy directed against the Webster by the defendants and the alleged co-conspirators, the distributors, during the claimed damage period from the evidence developed in the whole record. Such decree as admitted is only prima facie evidence of the alleged conspiracy, not conclusive. Fifth & Walnut v. Loew's, Inc., 2 Cir., 176 F. 2d 587, 590; Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 2 Cir., 190 F. 2d 951, 957-8.

The position of the plaintiff is that the Schine interests by the unlawful use of monopoly buying power of films prevented the plaintiff from competing with Schine in the business of exhibiting motion pictures on the first neighborhood run in the City of Rochester. The pivot for this assertion is the undisputed fact that during the years

1942-1950 it is true that the State Theatre of Schine played the pictures for the neighborhood in every instance ahead of the Webster of the plaintiff (Exhibit 13). It is also true that during this period the State made more money than the Webster (Exhibits A, X). From these isolated facts without more, the plaintiff urges that together with the decree, which I have limited, the streamers of conspiracy must flow with no regard to the conduct of the parties or the surrounding circumstances. The motto seems to be: We have the decree, we have the theatre, we do not have as much money as we should, and finally, we must have been hurt by unlawful monopoly. This, to me, is not only bad logic but bad law. Of course, it is difficult in these cases to bring in photographs of the conspiracy in operation, but reliance must be had upon the reasonable inferences drawn from the conduct in the light of the surrounding circumstances, and there must be some relation of the impact of the conspiracy to a particular theatre. (Gardonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F. 2d 594, 596, 598; Emich v. General Motors, supra, pages 570, 571; Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra, page 543). The evidence of the plaintiff will not allow me to draw the inference that a knowing conspiracy continued and existed to deprive the plaintiff of first neighborhood runs in Rochester, but together with this failure of proof of alleged conspiracy and unlawful monopoly there are countless factors in the proof that tend the other way, i.e., that under the circumstances present it was reasonable business practice proven throughout the years that the State as a better customer should run previous to the Webster, and this arrangement was accepted by Max Fogel and his plaintiff corporation with the benefit to them of lower rentals.

(Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 100 F. Supp. 84, 89; affirmed 215 F. 2d 167, cert. denied 348 U.S. 912; Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 2 Cir., 190 F. 2d 951, 957-58, cert. denied 342 U.S. 926).

Formidable among these facts in the evidence is that agreed to by Fogel that when the Webster and State split the first neighborhood run in the 1927-1933 era, when Schine was a partner, the Webster lost money (R. 49, 50; 147, 158, 162, 165), and finally in this period the operating company of the Webster was dispossessed for failure to pay rent (R. 166). Then, it is clear that when the Schine interests took over the Webster in the 1940-1942 period the arrangement was continued by Schine to have the State play the neighborhood run ahead of the Webster (R. 106-107). To reason with the plaintiff at this time it would be necessary to conclude Schine was conspiring and monopolizing against his own interest. I am not convinced at all that Schine was champing at the bit to get back the Webster in 1940 because the record indicates to me that Fogel, during this period, was always the moving party and persistent in his efforts to interest Schine again in the Webster (R. 175, 179; Exhibits G, H, I, AA). The temporary order agreed to by the defendants in 1942 (Exhibit 7) with detailed prohibitions to refrain from certain practices, and giving access to their records by the government, together with the same type agreed to by the distributors in 1941, must be given great weight in the consideration of whether these people were bold enough to continue this alleged conspiracy of unlawful monopoly in this small neighborhood of Rochester. At least, it places further burden upon the plaintiff to prove by evidence of quality such situation continued in the face of this government pressure and supervision, with the tremendous power to search for

illegality in the corporate records. Such evidence is lacking, and it must be realized that after a period of seven years that this case has been at issue, with the liberal and settled pretrial procedures of discovery and interrogation in this federal court, there is only one letter produced with any significance to the issue of intentional collaboration and agreement, and that is an equivocal one (Exhibit 14).

The most striking impression I gain by a review of the record is the attitude of Max Fogel himself as to whether or not he considered, under the circumstances, that the Webster should precede the State in the matter of neighborhood first run. The record does not disclose that he made any protest at all during the 1933-1940 period. From 1942-1950 the impression stands out—and I say it with all charity—that he was sitting on the sidelines with his Webster Theatre waiting to be conspired against and willing to watch his lawsuit grow. If anyone during these years knew the complaint department he did, because he had, according to his own testimony, a most serious and intimate contact when he says he told the government lawyers in Washington that Schine forced him to recant the previous government affidavit and give a false one in order to regain the Webster. He was out of the clutches of Schine after he regained the theatre, he sat through the government case in court against Schine although not called as a witness, and it would be incredible to infer that if he thought he were being wronged by deprivation of first run he would not protest to the nearest government attorney. His testimony that he did make demands upon certain branch managers, which he was allowed to state upon a reopening of his case, was hazy, casual and not too persuasive to me, and I evaluate it in such manner because of the many inconsistencies in other parts of his testimony (R. 70, 91, 130,

149, 153, 158, 165, 198, 219, 225, 251, 257, 299). Surely a person wronged as Fogel claimed to be during this long period by an arbitrary and unlawful deprivation of first run which he wanted, would have indulged in some letter writing both to Schine and the distributors setting forth his complaint. (See Milgram v. Loew's, Inc., 3 Cir., 192 F. 2d 579). All we have is the meaningless Exhibit 14, which was a letter to Fogel from a distributor, to which he made no answer or complaint about the arrangement or other arrangements. Also to be considered on the important attitude of Fogel as to whether he really wanted first run and the increased rental expense is the fact that when he settled with the distributors in 1948 he did not even then request or demand a run ahead of or equal with the State Theatre, but was satisfied with a slight advance in his schedule after the State.

Whether the demand element is as vital to this lawsuit as set forth in Milwaukee Towne Corp. v. Loew's, Inc., 7 Cir., 190 F. 2d 561, cert. denied 342 U.S. 909, is not necessary for this decision because I consider the lack of it only as again indicative of the fact that the plaintiff operator himself accepted the first run set-up as it existed without protest, thereby giving good intimation that the arrangement was neither conspiratorial or monopolistic. (See J. J. Theatres, Inc. et al. v. Twentieth Century-Fox Film Corp., 2 Cir., 212 F. 2d 840, 845). Congress Building Corp. v. Loew's, Inc., 7 Cir., 246 F. 2d 587, agreed with the demand requisite as applied in this sense when it elaborated on the Milwaukee Towne Corporation case.

The testimony of the top men in the distribution part of the movie industry was unhesitatingly to the effect that the State was a better theatre for location and revenue than

the Webster and this testimony was also reliable and factual as was that of McKay, then general counsel for Schine, that there was never any agreement or meeting of the minds to deprive the Webster of first neighborhood run if it wanted it. If it is considered important to this decision, the testimony of White, an exceptionally capable manager for Schine, establishes that efficient and warm-hearted management can produce higher gross without the priority of first run when matched against a neighborhood theatre; the comparison being the Webster and the Dixie of the Schine interests (R. 480-518, Exhibit V). Frankly, with my view of the record and the disposition I make I do not think it necessary to go in so deep.

This opinion shall constitute my findings of fact, and my conclusion in favor of the defendants is made because: (1) there is not sufficient showing by the plaintiff in the evidence that the defendants, by the unlawful use of monopoly buying power of film, and the alleged co-conspirators, agreed and conspired in the 1942-1950 period to arbitrarily deprive the Webster from first neighborhood run or the right to compete for first neighborhood run in the City of Rochester; (2) the conduct of the parties in the operation of the two theatres, the Webster and the State, and the circumstances surrounding their operation and the evidence as a whole rebuts any presumption or inference of conspiracy afforded by the consent decree in the government case, particularly during the claimed damage period from 1942-1950; (3) there was no demand or request by the plaintiff for first run neighborhood pictures and the evidence indicates a willingness and contentment to follow the State at the lower rental for the second neighborhood run; (4) there is no credible evidence to convince that the Webster was clearly a better customer from the distri-

bution point of view than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy. (Dipson v. Buffalo, supra, pages 957-958); (5) the proof is not sufficient to infer or conclude as charged in the complaint that the defendants, during the years 1942-1950 conspired, combined, or conspired among themselves or with any of the alleged co-conspirators, or with others, to violate the antitrust laws by unlawful restraint and monopoly.

Judgment shall enter in favor of the defendants dismissing the complaint upon the merits. (See Matteson v. United States of America, 240 F. 2d 517).

It is So Ordered.

Dated: Albany, New York, December 10, 1957.

James T. Foley
United States District Judge

The exhibits will be returned to the respective attorneys by whom introduced. The several volumes of the United States v. Schine case furnished by the defendants will be retained at Chambers to be called for by the attorneys for the defendants at their convenience.

OPINION, UNITED STATES COURT OF APPEALS FOR THE SECOND DISTRICT

(263 F. 2d 533)

(Decided February 13, 1959)

This is an appeal from a judgment of the District Court for the Northern District of New York, dismissing after a trial to the court a complaint for violation of the antitrust laws.

Hand, *Circuit Judge:*

The plaintiff appeals from a judgment of Judge Foley, dismissing its complaint demanding treble damages for violation of the antitrust laws (§15, Title 15, U.S.C.). The action was tried to the judge who delivered an elaborate opinion reported in 157 Fed. Supp. 251, to which we refer as the supplement to what we say. The claim in suit arose from an alleged injury to the plaintiff, the corporate owner of a moving picture house in the City of Rochester, called "The Webster," whose shares were held by one, Max Fogel. The gravamen of the claim was that the defendants between June, 1942, and May, 1950, by virtue of their monopolistic control over moving picture "distributors," succeeded in preventing "The Webster" from receiving "first neighborhood run" of films; and that during this period another theatre, known as the "State" and controlled by the defendants, always got the "first neighborhood run," although "The Webster" was as good, and as well situated as the "State." After extended hearings

consisting in large part of the testimony of Fogel himself, the judge made the following findings of fact at the close of his opinion: (1) that the evidence did not disclose any conspiracy to monopolize films between 1942 and 1950, and arbitrarily to deprive the plaintiff of "first neighborhood runs." (2) That the evidence rebutted "any presumption or inference" of the continuance during 1942 to 1950 of the conspiracy of which the defendants were found guilty by the Supreme Court in Schine Chain Theatres, Inc. v. United States, 334 U.S. 110. (3) That the plaintiff had made no demand upon distributors for any first neighborhood run of the films shown at the "State" theatre. (4) That the evidence did not show that "The Webster" "was clearly a better customer . . . than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy."

Judge Foley described at length the dealings between Fogel and the defendant J. Myer Schine, beginning shortly after Fogel built "The Webster" in 1927, a year after defendants' "State" theatre was built. The two theatres were six blocks apart and continued either in competition or cooperation until 1933 when Schine abandoned an interest that he had acquired in "The Webster." Fogel kept on alone until the autumn of 1940 when Schine took control and Fogel became his employee. In June, 1942, Fogel reacquired his interest in "The Webster" and the period of alleged injury began. Meanwhile, the United States had brought the action of which we have spoken under the antitrust laws which was finally determined by the Supreme Court on May 3, 1948, and in which the court held that a chain of about 148 motion-picture theatres located in 76

towns and in six states was controlled by the defendants, and had been operated in violation of the antitrust laws. This action had been brought in the District Court for the Western District of New York and in it Judge Knight made the following findings which was affirmed by the Supreme Court:

> "All findings made herein with respect to any acts committed by the defendants or any of them, or any course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date."

Judge Foley held that this finding limited the "prima facie estoppel" of the judgment of the Supreme Court under §16 of Title 15, U.S.C. to the period before May 19, 1942, and therefore to a period before the beginning of that for which the plaintiff demanded damages. There can be no doubt that this was a proper interpretation of the statute (Theatre Enterprises v. Paramount Film etc. Co., 346 U.S. 537, 541, 543). Congress by choosing the word, "estoppel," indicated that it meant the judgment to have no greater effect, even prima facie, between individuals than that effected by an estoppel" under the ordinary doctrine of *res judicata;* and it is too well settled to require citation that the effect of an estoppel is confined to the facts actually adjudicated. Therefore, the decree in the Government suit had no evidential effect beyond Judge Knight's finding.

There remains the question whether the existence of such a conspiracy until May 19, 1942, might be the basis

of an inference that it continued thereafter. We do not mean to suggest that, even if this be a permissible inference, it would make "clearly erroneous" Judge Foley's first finding that the plaintiff did not show that the defendants made any "unlawful use of monopoly" after May 19, 1942; but the situation is not even as favorable to the plaintiff as that. An order, *pendente lite*, was entered, apparently in May, 1942, by which the defendants were directed to dispose of the interest they then had in "The Webster" and this they did. It is of course conceivable that after surrendering control of that theatre in pursuance of this order they began to discriminate against it, though the surrender had been in compliance with an order in the Government suit; but in the face of both the surrender and the continued existence of the Government suit, we cannot agree that the decree in that suit served as a basis for supposing that the conspiracy found to have then existed continued, at least as to "The Webster." Be that as it may, the plaintiff had the burden of proving that the conspiracy in fact did continue and the judge's reasons for discrediting the plaintiff's testimony make impossible a reversal of his first and second findings.

Furthermore, he found that there was "no credible evidence to convince that the Webster was clearly a better customer from the distribution point of view than the State and that a different pattern of distribution would have been more to the interests of the distributors and thus allow an inference of conspiracy." Read strictly, it is true that this finding does not necessarily justify the uniform preference of the "State" theatre in the distribution of films; as it would have if the "State" theatre were the better customer of distributors, though we should have been

tempted to read it as meaning that the "State" theatre was the "better customer," even if the finding stood alone. However, when we read it with the following passage from the opinion all doubt disappears.

> "The testimony of the top men in the distribution part of the movie industry was unhesitatingly to the effect that the State was a better theatre for location and revenue than the Webster and this testimony was also reliable and factual as was that of McKay, then general counsel for Schine, that there was never any agreement or meeting of the minds to deprive the Webster of first neighborhood run if it wanted it."

Finally, we can see no answer to the defendants' argument that there was no proof that Fogel ever demanded "first run" films on an equality with the "State" theatre; and in J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., 212 Fed. (2) 840, we held (following the Seventh Circuit, Milwaukee Towne Corp. v. Loew's, Inc., 190 Fed. (2) 561), that such a demand was a necessary condition of any claim for relief. We repeat what we said in that case, page 845: "The plaintiffs cannot recover damages on account of any failure to obtain future pictures for first run exhibition unless they made demand for that of which they now claim they were deprived by the conspiracy."

Judgment affirmed.